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UNITED NATIONS CONFERENCE ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE

FIRST COMMITTEE

SUMMARY RECORD OF THE 9th MEETING

Held at the Austria Center Vienna,
on Tuesday, 9 April 1991, at 9.30 a.m.

Chairman: Mr. BERAUDO (France)

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The meeting was called to order at 9.40 a.m.

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Article 6 (continued) (A/CONF.152/C.1/L.45, L.51)

1. The CHAIRMAN reminded the Committee that at the previous meeting it had decided to retain the dual system of limits of liability set out in article 6 (1) (a) and (b). It now had to decide whether to approve the amounts of units of account at present enclosed in square brackets in those two subparagraphs. The first figure, 8.33 units of account, was derived from the CMR Convention, while the second, 2.75 units of account, was derived from the Multimodal Convention of 1980.

2. Mr. ROMAN (Belgium) supported the views that had been expressed at the previous meeting by the representatives of Morocco and the United Kingdom. The limit of the operator's liability should never be higher than that of the carrier's; the limit should also be related to the mode of carriage that had been chosen.

3. The CHAIRMAN invited the Committee to vote on the proposal by Morocco (A/CONF.152/C.1/L.51) that the figure "2.75" in article 6 (1) (b) should be reduced to "2.5".

4. The proposal was rejected by 13 votes to 8, with 4 abstentions.

5. Mr. HORNBY (Canada), speaking in explanation of his delegation's vote, said he had voted in favour of the proposal because he believed that the limits applicable to operators of sea terminals were most likely to become widely accepted. The lower limits proposed by Morocco were those contained in the Hamburg Rules, which, once they had entered into force, would gain wide acceptance.

6. The CHAIRMAN reminded the Committee that the previous day oral proposals had been made by the delegations of Denmark and Germany in favour of higher limits than those given in the text. He suggested that the Committee should vote on those proposals.

7. Mr. LARSEN (United States of America) asked whether a vote for higher limits would be a vote for a real increase in the limits, or simply a vote for an increase to take account of inflation.

8. The CHAIRMAN said the issue to be voted on was whether or not the figures appearing in article 6 (1) (a) and (b) should be increased. If the majority favoured such an increase, a working group might perhaps be set up to determine what the new limits should be.

9. Mr. BONELL (Italy) thought that the Committee should not be asked to decide at the present stage whether the limits should be increased; rather, it should be asked to decide whether the figures given should be adjusted to take account of inflation.

10. Mr. LAVIÑA (Philippines) shared that view.

11. Mr. LARSEN (United States of America) said the problem was that while the Committee had just voted against lowering the limits, a vote in favour of keeping

(Mr. Larsen, United States of America)

the existing figures would amount in effect to a vote in favour of lowered limits. He agreed with the Italian representative that the issue the Committee should in fact be voting on was whether to keep the existing limits, adjusted for inflation: so adjusted, the figures would be approximately 11.5 units of account for land transport and 3.15 units of account for sea transport.

12. Ms. JØRGENSEN (Denmark) explained that when she had earlier expressed a preference for a higher limit, that had been in the context of a single, unified system of limitation for all forms of transport. While the dual system was still in force, she would prefer to keep the existing limits.

13. Mr. FRANCONI (Instituto Argentino Uruguayo de Derecho Comercial), speaking at the invitation of the Chairman, pointed out that any increase in limits would immediately be followed by corresponding measures on the part of the companies concerned, notably with regard to insurance, measures which would be reflected in increased charges.

14. The CHAIRMAN invited the Committee to vote on the proposal to increase the figures quoted in article 6 (1) (a) and (b).

15. The proposal was rejected by 19 votes to 8, with 4 abstentions.

16. Mr. LAVIÑA (Philippines), speaking in explanation of vote, said that although his delegation favoured a higher limit, it had abstained because the question at issue had not been properly clarified. As he saw it, the interpretation of the position given by the United States representative in fact constituted a proposal, and it was that proposal which should have been voted on.

17. Mr. FILIPOVIĆ (Yugoslavia), introducing his proposal to add a sentence to article 6 (4) (A/CONF.152/C.1/L.45), said it was intended to make it clear whether or not the operator's servants or agents would be bound by an agreement on the part of the operator to increase the limits of liability as provided for under that paragraph. All existing transport conventions made provision for operators to make such an agreement by means of a special declaration. While it already seemed clear that the operator's servants and agents would be bound by such an agreement, it was less clear whether it would also be binding upon independent contractors. The issue was an important one, and should not simply be left to the courts in the various States to interpret.

18. The CHAIRMAN suggested that it would be more appropriate to include the sentence in article 7 (2).

19. Ms. JØRGENSEN (Denmark) supported the proposal, and agreed that it would be better placed in article 7 (2).

20. Mr. CHRISTOV (Bulgaria) remarked that the Yugoslav proposal had no legal foundation, as the relationship between the operator and his servants or agents or other persons was res inter alios acta.

21. Mr. LAVIÑA (Philippines) thought that the proposed text was self-evident and could be added to article 6 (4) without modifying its legal effect. He was not in favour of putting it in article 7 (2).

22. Mr. SWEENEY (United States of America) agreed that the appropriate place for the Yugoslav proposal was in article 7 rather than article 6. With regard to the substance of the proposal, it was self-evident in so far as it concerned the

(Mr. Sweeney, United States of America)

operator's servants or agents, but he would endorse the Bulgarian representative's view that a legal problem arose in connection with the "other persons" referred to.

23. Mr. BONELL (Italy) said that he failed to see how the operator's servants or agents or other persons involved in the performance of the transport-related services could be bound by a contractual provision agreed upon between the operator and the customer.

24. Mr. RUSTAND (Sweden) said that he saw no difficulty in accepting the Yugoslav proposal, which he considered to be a logical counterpart of the entitlement provided under article 7 (2).

25. Mr. FRANCONI (Instituto Argentino Uruguayo de Derecho Comercial), speaking at the invitation of the Chairman, said that under Argentine law an agreement concluded between the operator and the customer would apply to the operator's servants or agents, but not to other persons such as contractors or subcontractors.

26. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) said that he favoured the principle incorporated in the Yugoslav proposal and would have no objection to its being added to article 6 (4), although he agreed that article 7 (2) would be a more appropriate place.

27. Mr. ABASCAL (Mexico) pointed out that the limits of liability referred to in article 7 were those provided for in the Convention, while the Yugoslav proposal was concerned with limits of liability agreed between the operator and the customer. In his view, the latter were binding upon the operator alone and could not be extended to his servants or agents or other persons of whose services he made use for the performance of the transport-related services.

28. Mr. WEISER (International Union of Marine Insurance), speaking at the invitation of the Chairman, said that he shared the concern expressed by a number of delegations with regard to the position of independent contractors. From the insurance point of view, the provision might create severe problems for the independent contractor as regards insurance cover for his liability, the extent of which might not even be known to him.

29. Mr. FILIPOVIĆ (Yugoslavia) said that he would have no objection to his proposal being incorporated in article 7. With regard to other points raised during the discussion, he said that there was no possibility of the contractor being unaware of the extent of liability he might incur, as the precise value of the goods would be stated in the consignment notes and other documents. With regard to the question of insurance, he drew attention to article 6 (4) of the Hamburg Rules, which spoke of an agreement between the carrier and the shipper increasing the carrier's limit of liability.

30. Ms. SISULA-TULOKAS (Finland) said that her delegation would have difficulty in accepting the Yugoslav proposal in so far as it affected independent contractors. She referred in that connection to article 10 (3) of the Hamburg Rules, which provided that any special agreement under which the carrier assumed obligations not imposed by the Convention affected the actual carrier only if agreed to by him expressly and in writing.

31. Mr. ZHAO Chengbi (China) pointed out that whereas the main object of article 7 (2) was to protect the interests of the operator's servants or agents or other persons of whose services he made use for the performance of the transport-related services, that of the Yugoslav proposal was to protect the

(Mr. Zhao Chengbi, China)

interests of the customer. For that reason, he would be opposed to including the proposal in article 7. He agreed with previous speakers that an agreement concluded by the operator could not be automatically applicable to the "other persons" referred to in the text.

32. Mr. CHRISTOV (Bulgaria) said that the provision proposed by the Yugoslav delegation would have no legal value unless the servants, agents or other persons referred to were informed of the terms of the agreement between the operator and the customer.

33. Mr. NAOR (Israel) said that a distinction should be drawn between the limits of liability that were compulsory under the Convention and those agreed upon separately between the operator and the customer. The Convention should deal only with the compulsory limits and leave the question of those arranged by separate agreement to the parties to that agreement.

34. Mr. ILLESCAS (Spain) remarked that the Yugoslav proposal was couched in more mandatory terms than article 7 (2). For his part, he would prefer to maintain the non-imperative, discretionary character of the present wording of article 7 (2). However, at least part of the Yugoslav delegation's concerns might be met by adding the words "and the contract" at the end of article 7 (2).

35. Mr. LEBEDEV (Union of Soviet Socialist Republics) suggested that, in view of the substantial differences of view which had emerged during the debate, a separate vote should be taken on the question whether the higher limits of liability agreed to by the operator applied also to the operator's servants or agents, on the one hand, or to his servants or agents or other persons of whose services he made use for the performance of the transport-related services, on the other. With regard to the applicability of the higher limits of liability agreed to by the operator to the operator's servants or agents, he noted that no provision of that nature was to be found in the Hamburg Rules or in earlier international transport conventions. Adoption of the Yugoslav proposal, even without any reference to "other persons", might entail certain consequences with regard to the future interpretation of article 7 (2) of the Hamburg Rules. For that reason, he was inclined to think that it might be preferable not to adopt the proposal.

36. Mr. RUSTAND (Sweden) expressed his delegation's continuing support for the Yugoslav proposal. Unless a contractor or subcontractor was aware of the limits of his liability, he was unlikely to offer his services to the operator.

37. Mr. AL-ZABEN (Saudia Arabia) considered that, although the principle behind the Yugoslav proposal was appropriate, it might impose unnecessary liability on "other persons". The problem could be solved by adding a phrase to the effect that servants, agents or other persons must be made aware of their liability.

38. Mr. BONELL (Italy) said it was clear from its title that the draft Convention dealt with the liability of the operator of a transport terminal in regard to his customer. The only contractor employed by the customer was the operator of the transport terminal, and the present purpose was to establish the basis of and mandatory limits to his liability. The operator could never derogate from the limits of his liability to the detriment of the customer, but could, under article 6 (4), derogate in the customer's favour by agreeing to higher limits of liability. The purpose of article 7 was to avoid all the differences in national legal systems between contractual claims, tortious claims, quasi-contractual

(Mr. Bonell, Italy)

claims, etc., by stating, in paragraph 1, that the the defences and limits of the liability applied irrespective of the nature of the action brought against the operator. The purpose of article 7 (2) was to cover the case in which a servant, agent, or other person such as an independent contractor might be responsible for damage or loss of goods under tortious liability should the customer bring an action against him. In such a case, the servant, agent or other person could avail himself of the same benefits as the operator. However, it would be very surprising, and even illogical from a legal point of view, to say that the operator's contractual agreement to increase his limits of liability also applied to other persons. It was not enough to assert that such other persons must be made aware of the increased limits of liability; they must accept such a clause before it could be invoked against them. Nothing was said in the Hamburg Rules about such an automatic extension of liability. In article 10 (3), the "actual carrier" was bound by any special agreement between the carrier and the customer only if he so agreed expressly and in writing. In short, it was almost impossible to accept a proposal such as that submitted by Yugoslavia because the law did not allow contractual provisions to be extended to third parties.

39. Mr. FILIPOVIĆ (Yugoslavia) said that the aim of his proposal was to bring the matter under discussion, since the Convention covered not only the servants and agents of the operator of a transport terminal, but also other persons, such as independent contractors, used by him and bound to him in a business relationship. It would be quite possible for the Conference to fix limits, as in article 6 (1) (a), with respect to such persons, or to delete article 6 (4). It was up to the Conference to decide.

40. After a procedural discussion in which Mr. SWEENEY (United States of America), Mr. LEBEDEV (Union of Soviet Socialist Republics), Mr. BONELL (Italy), Mr. MESCHERYAK (Ukrainian Soviet Socialist Republic), Mr. RUSTAND (Sweden) and the CHAIRMAN took part, the CHAIRMAN invited the Committee to proceed to an indicative vote on the following three questions:

(a) Should higher limits of liability agreed to by the operator apply only to the said operator?

(b) Should higher limits of liability agreed to by the operator apply also to the operator's servants and agents?

(c) Should higher limits of liability agreed to by the operator apply also to the operator's servants and agents and to other persons of whose services the operator made use?

41. After the indicative vote, the CHAIRMAN announced that 20 delegations had voted in favour of question (a), 13 in favour of question (b), and 3 in favour of question (c).

42. Mr. FILIPOVIĆ (Yugoslavia) said that the vote showed that his delegation had been right to relate its proposal to article 6 (4), because it had become apparent that it gave rise to differences of interpretation, which the Conference was in a position to eliminate. In some legal systems only the operator would be concerned, in others it would be the operator and his servants and agents, and in still others it would be other persons as well. In his view a positive decision was needed, and he therefore wished his proposal to be put to the vote.

43. The CHAIRMAN said that since the third alternative had received only three votes, the Committee might wish to choose between the other two alternatives.

44. After a procedural discussion in which Mr. FILIPOVIC (Yugoslavia) and Mr. RUSTAND (Sweden) took part, the CHAIRMAN, noting that the Yugoslav representative was no longer pressing his proposal, invited delegations to express their views by means of an indicative vote on whether a contractual commitment of the operator applied also to the operator's servants or agents.

45. After the indicative vote, the CHAIRMAN announced that 16 delegations considered that the commitment did not apply, 15 thought that it did apply and 4 delegations had abstained. In his opinion, the results were not clear enough to enable the plenary to take a decision, which required a two-thirds majority of the participating States present and voting. The Committee could either keep the existing text or leave it to States to adopt the first or second alternative in light of their national legislation.

46. Article 7 (2) gave rise to some difficulty, since it could be interpreted as allowing other persons used to be affected by the operator's contractual commitment. Therefore, he thought that it would be necessary for the Drafting Committee to revise the text in order to show clearly that "other persons" used by the operator would not be affected by a contractual increase in the operator's liability.

47. Mr. CHRISTOV (Bulgaria) said his delegation thought that article 7 (2), was quite clear and in accordance with the Hamburg Rules. He did not think that it required any revision.

48. Mr. RUSTAND (Sweden) thought that it was not appropriate, in view of the results of the indicative vote, for the Committee to refer the text of article 7 (2) to the Drafting Committee. It should be left to States to interpret the provision in the light of their national legal systems.

49. After a procedural discussion in which Mr. LEBEDEV (Union of Soviet Socialist Republics), the CHAIRMAN and Mr. BELLO (Philippines) took part, Mr. LARSEN (United States of America) said that he wished to draw attention to his delegation's proposal (A/CONF.152/C.1/L.14), which could provide a solution to the problem facing the Committee by suggesting that the agent should not be affected by an increase in the operator's liability.

50. The CHAIRMAN said that the United States proposal dealt with a different matter from that under discussion at the present time. It would be taken up under article 7.

51. Mr. RAO (India) said that article 7 (2) lent itself to different interpretations. The Committee was drafting a Convention that dealt with the liability of the operator and not that of his agents or servants. Under article 5 it was the operator who was liable for the actions of his agents or servants or other persons of whose services he made use for the performance of the transport-related services. However, under article 7 (2), if the customer proceeded against servants, agents or other persons used by the operator for the performance of the transport-related services, they were entitled to the same defences and limits of liability as the operator. In accordance with article 8 (2), however, when a servant, agent or other person caused damage deliberately, the defences and limits of liability would not apply to him. Article 7 did not deal with the question of the limits of liability when the servant, agent or other person acted beyond the scope of his employment or engagement. The intention appeared to be, and rightly so, that the matter was

(Mr. Rao, India)

something to be regulated by national legislation or in the contract between the operator and the person concerned. In his delegation's opinion, article 6 (4) should be left as it stood and the other aspects should be governed by national legislation.

52. The CHAIRMAN said that if he heard no objection, he would take it that the Committee was in favour of keeping the existing text of article 6 (4).

53. It was so agreed.

The meeting rose at 12.30 p.m.